Noor Ashid bin Sakib v Ketua Polis Negara

HIGH COURT (MUAR) — CRIMINAL APPLICATION NO 44–6 OF 2001
JEFFREY TAN J
9 SEPTEMBER 2001

Constitutional Law *— Preventive detention — Application for habeas corpus — Detention under Internal Security Act 1960 — Detaining authority to comply with procedural requirements under s 73 — Refusal to allow visitation by relatives and counsel pending investigation, whether bad faith and denial of right to counsel — Distinction between preventive detention and detention pending investigation under s 117 Criminal Procedure Code, whether allegations must be supported by evidence — Federal Constitution art 5*

The applicant was a religious teacher at the Madrasah Al-Masriyah Simpang Rengam and a member of Parti Islam Malaysia who had been arrested and detained under s 73 of the Internal Security Act 1960 ('the ISA') pending enquiries. An order of detention under s 8 of the ISA had not been made against the applicant. The applicant was detained for more than 30 days but less than 60 days. The police had refused the applicant visitation by relatives and counsel pending investigations. The applicant filed a motion for an order that a writ of habeas corpus be issued to the Inspector General of Police to release the applicant before this court.

Held, refusing the application for a writ of habeas corpus:

(1) In accordance with art 5(1) and (3) of the Federal Constitution ('the Constitution'), whenever a person deprived of his liberty challenges his detention, it is incumbent upon the authority who detains him to show that the detention is in the exercise of a valid legal power and that the detentive power had been exercised strictly in accordance with the provisions of the relevant law (see p 29D–F). However, it is not for the court to investigate into the sufficiency of the reasons or grounds relied on by the detaining authority for arrest and detention. Whether there is reasonable cause to detain is a matter of opinion and policy which can only be taken by the executive. The subjective satisfaction of the Minister is not subject to judicial review and the fairness of the Minister's decision is subjective and that the court is only concerned with the procedural aspect of the exercise of executive discretion (see pp 29H–30B). Therefore, the only issue for judicial determination was whether the detaining authority has complied with all the procedural requirements for each period of detention leading up to the present moment (see p 31H–I).

(2) The procedural requirements for an arrest and detention under s 73 of the ISA was set out in the same said section of the ISA. It was clearly shown from the facts that the detention of the applicant over several periods were made in accordance with the requirements under s 73 and therefore in the exercise of valid legal

power and according to procedure. The detention exceeding 30 days was also in order with regard to both legal authority and procedures (see pp 30I, 33B, E).

(3) To show breach of art 5(3) of the Constitution, an applicant has to show that the police had deliberately and with bad faith obstructed the applicant from exercising his right under the article and this had not been shown. What appeared rather was that the police had refused visitation by relatives and counsel pending ongoing but yet unfinished investigations. That was not any denial of the right to counsel (see p 34F–G).

(4) Counsel contended that the allegations against the applicant could be tried in a court of law. The applicant was being detained 'pending enquiries', much the same as in the position of a person being detained pending investigations under s 117 of the Criminal Procedure Code except that a detention under the ISA is an anticipatory measure which may not relate to an offence. Furthermore, there is power under the ISA to detain up to 60 days pending enquiries. The applicant could not insist that the detaining authority must act only under ordinary criminal laws. The making of an order under s 8 of the ISA, even if it should come to that, would not be the result of a trial, and it was futile to argue before a court without jurisdiction to consider the material if any against the applicant, that the allegations must be supported by evidence (see pp 35E–F, H–I, 36A–B).

(5) The right to apply for a writ of habeas corpus is enshrined in art 5(2) of the Constitution and such right is not illusionary. For the applicant to be released, unlawful detention and mala fide must be shown. Both, however, have not been shown and for that reason, habeas corpus was refused (see p 36B–C).

[**Bahasa Malaysia summary**

Pemohon adalah seorang ustaz di Madrasah Al-Masriyah Simpang Rengam dan seorang ahli Parti Islam Malaysia yang telah ditangkap dan ditahan di bawah s 73 Akta Keselamatan Dalam Negeri 1960 ('ISA') sementara menantikan siasatan. Satu perintah penahahan di bawah s 8 ISA masih belum dibuat terhadap pemohon. Pemohon telah ditahan selama lebih daripada 30 hari tetapi kurang daripada 60 hari. Polis telah menolak sebarang hak melawat pemohon oleh saudara-mara dan peguam sementara menantikan penyiasatan. Pemohon telah memfailkan satu usul untuk mendapatkan perintah bahawa satu writ habeas corpus dikeluarkan kepada Ketua Inspektor Polis untuk melepaskan pemohon di hadapan mahkamah ini.

Diputuskan, menolak permohonan untuk satu writ habeas corpus:

(1) Menurut perkara 5(1) dan (3) Perlembagaan Persekutuan ('Perlembagaan tersebut'), apabila seseorang yang terlucut hak

kebebasannya mencabar penanahannya, adalah wajib ke atas pihak berkuasa yang menahan beliau untuk menunjukkan bahawa penahanan tersebut adalah bagi melaksanakan kuasa undang-undang yang sah dan bahawa kuasa penahanan tersebut telah dilaksanakan dengan ketat menurut peruntukan undang-undang yang relevan (lihat ms 29D–F). Walau bagaimanapun, bukan bagi mahkamah menyiasat memandainya alasan-alasan atau sebab-sebab terhadap mana pihak berkuasa penahanan tersebut telah bergantung untuk penangkapan dan penahanan tersebut. Sama ada terdapatnya sebab yang berpatutan untuk menahan adalah suatu perkara pendapat dan dasar yang hanya boleh diambil tindakan oleh pihak berkuasa tersebut. Kepuasan subjektif Menteri tidak tertakluk kepada kajian semula kehakiman dan keadilan keputusan Menteri adalah subjektif dan mahkamah hanya mengambil berat akan aspek prosedur perlaksanaan budi bicara eksekutif (lihat ms 29H–30B). Oleh itu, satu-satunya isu untuk penentuan kehakiman adalah sama ada pihak berkuasa penahanan telah mematuhi semua kehendak prosedur bagi setiap tempoh penahanan sehingga kepada masa dan ketika ini (lihat ms 31H–I).

(2) Syarat-syarat prosedur untuk suatu penangkapan dan penahanan di bawah s 73 ISA telah dibentangkan di dalam seksyen ISA yang sama. Telah ditunjukkan dengan jelas daripada fakta-fakta tersebut bahawa penahanan pemohon selama beberapa jangka tempoh telah dibuat menurut syarat-syarat di bawah s 73 dan dengan itu dalam melaksanakan kuasa undang-undang yang sah dan menurut prosedur. Penahahan yang melebihi 30 hari adalah juga menurut kedua-dua kuasa undang-undang yang sah dan juga prosedur (lihat ms 30I, 33B, E).

(3) Untuk menunjukkan keingkaran terhadap perkara 5(3) Perlembagaan tersebut, seseorang pemohon haruslah menunjukkan bahawa pihak polis telah dengan sengaja dan dengan niat jahat menghalang pemohon daripada melaksanakan haknya di bawah perkara tersebut dan ini telah tidak ditunjukkan. Apa yang dapat dilihat adalah bahawa pihak polis telah enggan memberikan hak lawatan oleh saudara-mara dan peguam sementara menantikan penyiasatan yang sedang berjalan dan yang masih belum selesai. Itu bukannya sebarang penafian akan hak kepada perkhidmatan peguam (lihat ms 35E–F, H–I, 36A–B).

(4) Peguam menegaskan bahawa dakwaan-dakwaan terhadap pemohon boleh dibicarakan dalam mahkamah undang-undang. Pemohon yang telah ditahan 'sementara menunggu siasatan', adalah dalam kedudukan yang sama seperti seseorang yang sedang ditahan sementara menantikan penyiasatan di bawah s 117 Kanun Prosedur Jenayah kecuali penanahan di bawah ISA adalah suatu langkah jangkaan yang mungkin tiada kaitan dengan sesuatu kesalahan. Lagipun, terdapat kuasa di bawah ISA untuk

menahan sehingga kepada 60 hari sementara menantikan penyiasatan. Pemohon tidak boleh mendesak pihak berkuasa penahanan semestinya bertindak hanya di bawah undang-undang jenayah biasa. Pembuatan perintah di bawah s 8 ISA, meskipun sehingga ke tahap itu, bukan hasil sesuatu perbicaraan, dan adalah sia-sia untuk berhujah di hadapan mahkamah tanpa bidang kuasa untuk mempertimbangkan perkara penting tersebut jika ada terhadap pemohon, bahawa dakwaan-dakwaan tersebut haruslah disokong oleh keterangan (lihat ms 35E–F, 36A–B).

(5) Hak untuk memohon bagi mendapatkan satu writ habeas corpus termaktub di dalam perkara 5(2) Perlembagaan tersebut dan hak yang sedemikian bukannya ilusi sahaja. Untuk pemohon dilepaskan, penahahan yang salah di sisi undang-undang dan mala fide mestilah ditunjukkan. Kedua-duanya, walau bagaimanapun, masih belum ditunjukkan dan atas alasan itu, habeas corpus telah ditolak (lihat ms 36B–C).]

Notes

For cases on application for habeas corpus, see 3(2) *Mallal's Digest* (4th Ed, 2000 Reissue) paras 1725–1726.

Cases referred to

Chong Kim Loy v Timbalan Menteri Dalam Negeri Malaysia & Anor [1989] 3 MLJ 121 (refd)

Chng Suan Tze v The Minister of Home Affairs & Ors and other appeals [1989] 1 MLJ 69 (refd)

Karam Singh v Menteri Hal Ehwal Dalam Negeri, Malaysia [1969] 2 MLJ 129 (refd)

Ketua Polis Negara v Abdul Ghani Haroon and another appeal (Permohonan Jenayah 07–1–2001(B) & 07–2–2001(B)) (refd)

Lee Guan Seng v Timbalan Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor and another application [1992] 2 MLJ 878 (refd)

Liew Sai Wah v PP [1968] 2 MLJ 1 (refd)

Lock Wee Kock v Menteri Hal Ehwal Dalam Negeri & Anor [1993] 3 MLJ 691 (refd)

Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors v Chua Teck [1990] 1 MLJ 104 (refd)

Minister for Home Affairs, Malaysia & Anor v Karpal Singh [1988] 3 MLJ 29 (refd)

Ooi Ah Phua v Office in Charge Criminal Investigations, Kedah/Perlis [1975] 2 MLJ 198 (refd)

Ooi Cheng Aun v Timbalan Menteri Hal Ehwal Dalam Negeri & Ors [1990] 3 MLJ 108 (refd)

Puvaneswaran v Menteri Hal Ehwal Dalam Negeri Malaysia & Anor [1991] 3 MLJ 28 (refd)

Saul Hamid bin Fakir Mohamad v Inspector Abdul Fatah bin Abdul Rahman [1999] 6 MLJ 800 (refd)

Tan Sri Raja Khalid bin Raja Harun, Re, Inspector General of Police v Tan Sri Raja Khalid bin Raja Harun [1988] 1 MLJ 182 (refd) A

Theresa Lim Chin Chin & Ors v Inspector General of Police [1988] 3 MLJ 293 (refd)

Timbalan Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors v Cheow Siong Chin [1988] 1 MLJ 432 (refd)

Wong Fook Nyen v Timbalan Menteri Dalam Negeri & Ors [1988] 2 CLJ (Rep) 274 (refd) B

Yeap Hock Seng @ Ah Seng v Minister for Home Affairs, Malaysia [1975] 2 MLJ 279 (refd)

Legislation referred to C

Criminal Procedure Code s 117

Federal Constitution arts 5(1), (2), (3), 149

Internal Security Act 1960 ss 8, 8A, 8B(1), (2), 8C, 73(1)(a), (b), (3)(a), (b) , (c)

D

Hanifah bin Maidin (*Baharauddin bin Mohd Salleh* with him) (*Baharuddin & Partners*) for the applicant.

Abdul Karim bin Abdul Jalil (*Kamaruddin Mohd Said* and *Abasafree* with him) (Senior Federal Counsels) for the respondent.

Jeffrey Tan J: This is a motion (filed on 28 August 2001) for an order that E a writ of habeas corpus be issued to the Inspector General of Police, to produce the applicant for release before this court.

The documents filed herein reveal that the applicant, a religious teacher at the Madrasah Al-Masriyah Simpang Renggam and a member of a political party ('Parti Islam Malaysia'), was arrested and detained, under F s 73 of the Internal Security Act 1960 ('the ISA'), on 2 August 2001 at 10.55am.

In her affidavit dated 28 August 2001 (encl 2), one Fauziah bte Masran deposed that she is the wife of the applicant, that the police briefly informed her that the applicant had been detained under s 73 of the ISA, that the present whereabouts of the applicant is unknown, that she has not been able G to see the applicant since his arrest and detention, and that the applicant is not able to make the affidavit required under s 366 of the Criminal Procedure Code ('the CPC'). The said Fauziah bte Masran further deposed that she is concerned about the safety of the applicant, and that she believes that the applicant and other persons are accused of being involved in the H activities of Kumpulan Mujahidin Malaysia. And in her affidavit, Fauziah bte Masran put forth and energetically argued that the applicant could not have been involved in any activity detrimental to the security of Malaysia.

Encik Hanifah bin Maidin for the applicant submitted that ss 73(1)(a) and 73(1)(b) of the ISA must first be satisfied before arrest and detention of a person under s 73 of the ISA. The arresting officer must be satisfied that I there are grounds which would justify a detention under s 8 of the ISA, and that the person to be arrested and detained has acted or is about to act or is

likely to act in any manner prejudicial to the security of Malaysia or any part thereof or to the maintenance of essential services therein or to the economic life thereof. Exhibit 'FM–1', which was delivered to the wife of the applicant at the time of the arrest and detention reflected the mind of the arresting officer. What was in the mind of the arresting officer was that the applicant was involved in activities prejudicial to the security of Malaysia. The reason in para 11 of encl 7 was not set out in 'FM–1'. 'FM–1' must state the grounds as in s 73(1)(a) and (b) of the ISA. The liberty of a subject is at stake. The law must be construed strictly. Any ambiguity must be construed in favour of the subject (counsel cited *Liew Sai Wah v PP* [1968] 2 MLJ 1). Power to detain a person without trial cannot be exercised by inference. Power must be express, clear, and unequivocal. Since s 73 of the ISA was exercised, the respondent should have put in the clear an unequivocal grounds. 'FM–1' and encl 7 para 11 are inconsistent. Whether the respondent used both limbs to s 73(1) of the ISA is in doubt. Since both limbs were not stated in 'FM–1', the arrest and detention is unlawful. Section 73(3) of the ISA was not followed. In fact, the report to the IGP was submitted to the designated officer. It was the designated officer who submitted the report to the Minister. The designated officer was not a mere postman. The designated officer must apply his mind and prepare his report to the Minister. Since the report was submitted to the IGP, there was no material before the designated officer for him to apply his mind (counsel cited *Lee Guan Seng v Timbalan Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor and another application* [1992] 2 MLJ 878). The IGP or the designated officer must apply his mind. Since the IGP received the report, but the report to the Minister was made by the designated officer, then neither the IGP nor the designated officer had applied their minds. In para 9 of encl 7, the designated officer said he received the report. But there is no evidence that the report was forwarded to him. Section 73(3)(c) of the ISA does not say that the designated officer must satisfy himself. But the designated officer, in para 9 of encl 7, said that he was satisfied that the period of detention should be extended. The designated officer assumed powers that is not in s 73(3)(c) of the ISA. There is no evidence that the deponent of encl 7 is a Pegawai Turus E6B1. Exhibit 'PS3' of encl 7 did not name the designated officer. 'PS3' was made in 1999; but there is no evidence that 'PS3' is still valid in 2001. The allegations of the IGP are not supported by evidence. The applicant could be charged under existing law but not under the ISA. In *Chng Suan Tze v The Minister of Home Affairs & Ors and other appeals* [1989] 1 MLJ 69, the Singapore Court of Appeal applied an objective test. This court should apply an objective test. The activity alleged by the IGP could be tried in a criminal court. The alleged activity does not fall within national security considerations. Article 5(2) of the Federal Constitution ('the Constitution') allows an application for habeas corpus. Section 8B is inconsistent with art 5(2) of the Constitution. If a detenu cannot complain, then what is the purpose of art 5(2) of the Constitution? The right would become illusionary. There was a breach of art 5(3) of the Constitution. The applicant was not informed of the grounds of his arrest and was not allowed

to consult his lawyer. A request to see the applicant was refused. And finally En Hanifa asked, 'What is the harm in the applicant seeing his lawyer?' A

Encik Abdul Karim bin Abdul Jalil for the respondent submitted that the arrest and detention was in compliance with s 73 of the ISA and the Constitution. At the Simpang Rengam Police Station, the applicant was informed of the reason for his arrest and detention. 'FM–1' was given to the wife of the applicant. 'Yang penting di sini adalah pemberitahuan kepada pemohon semasa beliau ditangkap di balai polis Simpang Rengam.' 'FM–1' adalah notis kepada isteri dan sebab itu dia tidak boleh tahu mengapa pemohon ditangkap.' The controversy only concerns s 73(3)(c) of the ISA. 'Exhibit SS1 adalah kepada Pegawai Turus E6B1.' The deponent of encl 7 was a Pegawai Turus E6B1. 'Jawatan E6B1 ada disebut di PS4.' The report was forwarded to the officer concerned. The arrest and detention was in compliance with the law. The deponent of encl 7 applied his mind to extend the detention. It was not mechanical. Grounds for detention were disclosed. Details need not be given. Just the reason for the arrest is enough (Federal Counsel cited *Re Tan Sri Raja Khalid bin Raja Harun, Inspector General of Police v Tan Sri Raja Khalid bin Raja Harun* [1988] 1 MLJ 182, *Theresa Lim Chin Chin & Ors v Inspector General of Police* [1988] 2 MLJ 293, *Ching Kim Loy v Timbalan Menteri Dalam Negeri & Anor* [1989] 3 MLJ 121, and *Wong Fook Nyen v Timbalan Menteri Dalam Negeri & Ors* [1988] 2 CLJ (Rep) 274). The applicant has an undeniable right to counsel. But that right is suspended (Federal Counsel cited *Theresa Lim Chin Chin*). There is no allegation that in bad faith the respondent had deliberately obstructed the applicant from exercising his right. The police is of the opinion that access as yet should not be given to the applicant. A detenu not having counsel is not a ground for the grant of a writ of habeas corpus (Federal Counsel cited *Ooi Ah Phua v Officer-in-Charge Criminal Investigation, Kedah/Perlis* [1975] 2 MLJ 198). The purpose of habeas corpus is to release a person illegally detained and nothing else. The issue of access by counsel should not be a ground for the grant of a writ of habeas corpus. Sixty days detention may not lead to a s 8 detention order. Encik Abdul Karim then referred to the yet unreported decision of the Federal Court in *Ketua Polis Negara v Abdul Ghani Haroon and another appeal* (Permohonan Jenayah 07–1–2001(B) & 07–2–200KB), to rebut the argument that the alleged activities should be tried in a court of law. Encik Abdul Karim furthermore submitted that it is perfectly valid for the detaining authority to detain under detentive and not criminal laws. No mala fides have been shown. Detention under s 73 of the ISA and detention under s 8 of the ISA is one continuous detention. The arrest and detention was exercised under valid power. The applicant has not produced any evidence to the contrary. Section 8B of the ISA is valid, notwithstanding that it is inconsistent with the Constitution. Authority is given to the IGP to appoint the designated officer. The IGP could appoint a person by office. B C D E F G H

Encik Hanifa replied by first asking why was the reason in 'FM–1' different from the reasons in para 7 of encl 11. The actual reason must be given to both husband and wife. In his police report, the deponent of encl 11 gave a third reason for the arrest and detention — art 5(3) of the I

Constitution. The arresting officer should explain why only one reason was given to the wife of the applicant. There was no compliance with s 73(3)(c) of the ISA. The letter forwarding the report was addressed to both the IGP and the designated officer. Section 73(3)(c) of the ISA does not permit the report to be made to both. The report was carbon-copied to the Secretary-General of the Ministry. The respondent had gone beyond s 73(3)(c) of the ISA. Lastly, En Hanifa submitted that the court could review the decision, on the ground of any irrationality, procedural impropriety, and or *Wednesbury* unreasonableness, to which En Abdul Karim responded that the doctrine of *Wednesbury* unreasonableness cannot be applied to ISA cases.

In ISA cases, applications for a writ of habeas corpus are usually made after the Minister has made an order under s 8 of the ISA, directing that the person sought to be released be detained for a period of two years. As yet, there is no order of detention under s 8 of the ISA. Under what valid power then is the applicant being detained?

Article 5(3) of the Constitution provides that whenever the liberty of a person is deprived and a complaint is made, the court shall inquire into the complaint and unless satisfied that the detention is lawful shall order him to be produced before the court and release him. The preceding art 5(1) of the Constitution provides that no person shall be deprived of his life or personal liberty save in accordance with law. Consequently, whenever a person deprived of his liberty challenges his detention, it is incumbent upon the authority who detains him to show that the detention is in the exercise of a valid legal power (see *Re Tan Sri Raja Khalid bin Raja Harun, Inspector General of Police v Tan Sri Raja Khalid bin Raja Harun* [1988] 1 MLJ 182 at p 186), and that the detentive power, which the law gives to the executive for reasons such as public order, national security and crime prevention, had been exercised strictly in accordance with the provisions of the relevant law. For powers of preventive detention are interpreted strictly 'so as to require that the provisions of the relevant statute are rigidly and meticulously complied with' (*Puvaneswaran v Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor* [1991] 3 MLJ 28, per Edgar Joseph Jr, as he then was). An apt illustration of what is meant by strict observance of the powers of preventive detention is the case of *Ooi Cheng Aun v Timbalan Menteri Hal Ehwal Dalam Negeri & Ors* [1990] 3 MLJ 108, where an overnight stay in a hotel (not provided in the detention order) at the detenu's expense was held to have vitiated the detention order (note: s 8A of the ISA now provides that a detention order shall not be invalid or inoperative by reason that the person to whom it relates was detained in any place other than a place of detention referred to in ss 8(3) or 73 of the Constitution).

But other than to require the detaining authority to show that the detention is in the exercise of a valid legal power and that the provisions of the relevant statute have been rigidly and meticulously followed, it is not for the court to investigate into the sufficiency of the reasons or grounds' relied on by the detaining authority for arrest and detention. For it is settled law, that whether there is reasonable cause to detain is a matter of opinion and policy which can only be taken by the executive (see *Karam Singh v Menteri*

Hal Ehwal Dalam Negeri, Malaysia [1969] 2 MLJ 129), that so long as the Minister is satisfied after considering all the information available to him, it is not for the court to question how or why he became so satisfied *Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors v Chua Teck* [1990] 1 MLJ 104), that the subjective satisfaction of the Minister of Home Affairs is not subject to judicial review, *Minister for Home Affairs, Malaysia & Anor v Karpal Singh* [1988] 3 MLJ 29, that the fairness of the Minister's decision is subjective and that the court is only concerned with the procedural aspects of the exercise of executive discretion (*Theresa Lim Chin Chin & Ors v IGP* [1988] 1 MLJ 293), that courts do not sit in appeal against the decision of the Minister regarding the material on which the detention order was made, *Wong Fook Nyen v Timbalan Menteri Dalam Negeri, Malaysia & Ors* [1988] 2 CLJ 274; *Yeap Hock Seng @ Ah Seng v Minister for Home Affairs, Malaysia & Ors* [1975] 2 MLJ 279, that courts do not examine the adequacy or truth of these materials and cannot interfere with the decision on the ground that if the court had examined them it would have come to a different conclusion (*Wong Fook Nyen v Timbalan Menteri Dalam Negeri, Malaysia & Ors; Yeap Hock Seng @ Ah Seng v Minister for Home Affairs, Malaysia*), and that the court cannot arrogate to itself the responsibility of judging the sufficiency or otherwise of the grounds (*Wong Fook Nyen v Timbalan Menteri Dalam Negeri, Malaysia & Ors*).

Indeed, with regard to arrests and detentions under the ISA — an Act passed under art 149 of the Constitution and therefore valid notwithstanding that it is inconsistent with art 5 of the Constitution — see *Re Tan Sri Raja Khalid bin Raja Harun, Inspector General of Police v Tan Sri Raja Khalid bin Raja Harun* [1988] 1 MLJ 182 at p 185; *Chong Kim Loy v Timbalan Menteri Dalam Negeri, Malaysia & Anor* [1989] 3 MLJ 121 at p 127; and *Ketua Polis Negara v Abdul Ghani Haroon* — s 8B(1) of the ISA specifically provides that 'there shall be no judicial review in any court of, and no court shall have or exercise any jurisdiction in respect of, any act done or decision made by the Yang di-Pertuan Agong or the Minister in the exercise of their discretionary power in accordance with this Act, save in regard to any question on compliance with any procedural requirement in this Act governing such act or decision'. And even within that narrow area of possible judicial review, s 8B(2) of the ISA further qualifies that 'the exception in regard to any question on compliance with any procedural requirement in the ISA shall not apply where the grounds are as described in s 8A of the ISA'. One only has to read s 8C of the ISA to immediately appreciate that the ouster of judicial review of any act done or decision made by the Yang di-Pertuan Agong or the Minister in the exercise of their discretionary power in accordance with the ISA is total and all encompassing. In a word, there is no jurisdiction to review any act done or decision made by the Yang di-Pertuan Agong or the Minister in the exercise of their discretionary power in accordance with the ISA. The jurisdiction to review is only with regard to any question on compliance with the procedural requirements in the ISA. And in the case of the instant arrest and detention under s 73 of the ISA, the procedural requirements which are set out in the same said section in the ISA, are as follows:

A (1) Any police officer may without warrant arrest and detain pending enquiries any person in respect of whom he has reason to believe —

(a) that there are grounds which would justify his detention under s 8 of the ISA; and

(b) that he has acted or is about to act or is likely to act in any manner prejudicial to the security of Malaysia or any part thereof or to the maintenance of essential services therein or to the economic life thereof.

(2) ...

(3) Any person arrested under this section may be detained for a period not exceeding sixty days without an order of detention having been made in respect of him under s 8 of the ISA.

Provided that:

(a) he shall not be detained for more than 24 hours except with the authority of a police officer of or above the rank of Inspector;

(b) he shall not be detained for more than 48 hours except with the authority of a police officer of or above the rank of Assistant Superintendent; and

(c) he shall not be detained for more than 30 days unless a police officer of or above the rank of Deputy Superintendent has reported the circumstances of the arrest and detention to the Inspector General or to a police designated by the Inspector General in that behalf, who shall forthwith report the same to the Minister.

The language of s 73(1) of the ISA could not be any more plain or clearer; any police officer may without warrant arrest and detain pending enquiries any person in respect of whom he has reason to believe (a) that there are grounds which would justify his detention under s 8 of the ISA; and (b) that he has acted or is about to act or is likely to act in any manner prejudicial to the security of Malaysia or any part thereof or to the maintenance of essential services therein or to the economic life thereof. But that is not to say that a person could be detained for an indefinite period under s 73 of the ISA. First, s 73(3) of the ISA limits the maximum period of detention under s 73 of the ISA to a maximum of 60 days, and secondly, the provisos to s 73(3) of the ISA mandate, (a) that any detention exceeding 24 hours must be with the authority of a police officer of or above the rank of Inspector, (b) that any detention exceeding 48 hours must be with the authority of a police officer of or above the rank of Assistant Superintendent, and (c) that there cannot be any detention exceeding 30 days unless a police officer of or above the rank of Deputy Superintendent has reported the circumstances of the arrest and detention to the Inspector General or to a police designated by the Inspector General in that behalf, who shall forthwith report the same to the Minister.

As of this moment, the applicant has been detained for more than 30 but not 60 days. Given that the jurisdiction is only in regard to any question on compliance with any procedural requirement in the ISA, the only issue for judicial determination has to be if the detaining authority has complied with all the procedural requirements for each period of detention leading up to the present moment. With regard to the procedural requirement of

s 73(1) of the ISA, Assistant Superintendent of Police Wan Muhammad Najeeb bin Wan Ismail deposed in his affidavit (encl 11) that on 2 August 2001 at 10.55 pm and within the confines of the Simpang Rengam Police Station, he arrested the applicant in respect of whom that he had reason to believe (a) that there were grounds which would justify his detention under s 8 of the ISA (see encl 11 para 4) and (b) that he was a member of Kumpulan Mujahidin Malaysia that had conducted activities prejudicial to the security of Malaysia (see encl 11 para 5). ASP Wan Muhammad Najeeb also deposed that he informed the applicant, when he arrested him, that he had reason to believe that there were grounds which would justify his detention under s 8 of the ISA and that he, the applicant, had conducted activities prejudicial to the security of Malaysia (see encl 11 para 7), but that he had not disclosed further details as he was of the opinion that that would not be in the national interest (see encl 11 para 8). ASP Wan Muhammad Najeeb also deposed that he lodged a police report (exh WMN–1) relating to the facts of the arrest. With regard to the procedural requirement of s 73(3), Inspector Abdul Aziz bin Abdullah of the Special Branch, Bukit Aman, Kuala Lumpur, deposed in his affidavit (encl 10 para 3) that on 3 August 2001 at 10.35am and pursuant to s 73(3)(a) of the ISA he authorized the detention of the applicant for a further 24 hours, ie from 10.55am on 3 August 2001, for reason that ongoing investigations had not been completed; and Inspector Abdul Aziz exhibited his written authorisation (encl 10 exh 'AA–1'). With regard to the procedural requirement of s 73(3) (b). Assistant Superintendent of Police Rorete @ Clarence Rorote ak Sagon of the Special Branch, Bukit Aman, Kuala Lumpur, deposed in his affidavit (encl 9 para 3) that on 4 August 2001 at 10.30am and pursuant to s 73(3)(b) of the ISA he authorized the detention of the applicant for a further 28 days, ie from 10.55am on 4 August 2001, for the reason that ongoing investigations had not been completed; and ASP Rorete exhibited his written authorisation (encl 9 exh 'RCR–1').

Three affidavits (encls 5–8) relate to the procedural requirement of s 73(3)(c) of the ISA. Deputy Superintendent of Police Surina bte Saad of the Special Branch, Bukit Aman, Kuala Lumpur, deposed in her affidavit (encl 8 para 3) that on 28 August 2001 at 11.30am she reported the circumstances of the arrest and detention of the applicant to Deputy Superintendent of Police Philip a/l Savariappan who was the 'Pegawai Turus E6B1' and the officer designated under s 73(3)(c) of the ISA by the Inspector General of Police; and DSP Surina bt Saad exhibited her covering letter (encl 8 exh 'SS–1') for her report. Deputy Superintendent of Police Philip a/l Savariappan of the Special Branch, Bukit Aman, Kuala Lumpur, deposed in his affidavit (encl 7 paras 1 & 7) that he was a 'Pegawai Turus E6B1' and the officer designated under s 73(3)(c) of the ISA by the Inspector General of Police. DSP Philip also deposed (encl 7 paras 9 & 10) that he received the report from DSP Surina on 28 August 2001 at 11.30 am, that he was of the opinion that the detention of the applicant be extended to facilitate ongoing investigations, and that on 28 August 2001 at 11.30am he reported the circumstances of the arrest and detention of the applicant to the Minister: and DSP Philip exhibited the document

designating his office as a designated officer (encl 7 exh 'PS–2') and his covering letter (encl 7 exh 'PS–4') for his report to the Minister. And the Minister concerned, Dato' Seri Abdullah bin Haji Ahmad Badawi, deposed (encl 5 para 2) that he received the report on the circumstances of the arrest and detention of the applicant from DSP Philip on 30 August 2001 at 3.00pm.

Each period of detention, it has clearly been shown, was made in the exercise of valid legal power and according to procedure. Section 73(1) of the ISA undoubtedly authorized ASP Wan Muhammad Najeeb, since he had reason to believe that there were grounds which would justify the detention of the applicant under s 8 of the ISA and that the applicant was a member of Kumpulan Mujahidin Malaysia that had conducted activities prejudicial to the security of Malaysia, to arrest and detain the applicant. There was definitely nothing irregular or illegal about the initial arrest and detention for the first 24 hours. There was also nothing irregular or illegal about the detention for the next 24 hours, as Inspector Abdul Aziz, who had such authority pursuant to s 73(3)(a) of the ISA, authorized the detention of the applicant for a further 24 hours, ie from 10.55am on 3 August 2001. The same is also true of the detention exceeding 48 hours but not exceeding 30 days, as ASP Rorete, who had such authority pursuant to s 73(3)(b) of the ISA, authorized the detention of the applicant for a further 28 days, ie from 10.55am on 4 August 2001.

The detention now exceeding 30 days also seems to be in order with regard to both legal authority and procedure. Provided that the preceding detention is in order, the procedural requirements for further lawful detention exceeding 30 days, are: (a) a police officer of or above the rank of Deputy Superintendent has reported the circumstances of the arrest and detention to the Inspector General or to a police designated by the Inspector General in that behalf; and (b) the Inspector General or police designated by the Inspector General in that behalf has reported the circumstances of the arrest and detention to the Minister. And in the present case, DSP Surina bt Saad had reported the circumstances of the arrest and detention of the applicant to the designated officer who in turn had reported the same to the Minister, even before the period of detention under s 73(3)(b) of the ISA had lapsed.

Given that all procedural requirements had been met (the carboncopy to the secretary did not militate against the procedural propriety), the detention of the applicant for the period now exceeding 30 days but yet not exceeding 60 days, is still quite clearly with lawful authority.

Encik Hanifa contended that 'FM–1' must state both s 73(1)(a) and (b) of the ISA. But 'FM–1', even if it was lacking particulars, was not any information to the applicant of the grounds of his arrest. 'FM–1' was information to the next of kin of the applicant of the grounds of the arrest of the applicant. 'FM–1' was not a critical essential, for art 5(3) of the Constitution only mandates that the arrested person 'shall be informed as soon as possible of the grounds of his arrest and shall be allowed to consult and be defended by a legal practitioner of his choice'. Here, pertinent to the

first limb of art 5(3) of the Constitution, ASP Wan Muhammad deposed (encl 11 para 7) that immediately after he had arrested the applicant he informed the applicant that he had reason to believe that there were grounds which would justify his detention under s 8 of the ISA and that he had acted in manner prejudicial to the security of Malaysia. Sufficient information regarding the grounds had been conveyed to the applicant. It could not be contended that the applicant was not informed of the grounds of his arrest. And it could not be contended, since it was stated clearly in 'FM–1' that the applicant was arrested under s 73 of the ISA 'kerana dipercayai terlibat dalam kegiatan-kegiatan yang telah memudaratkan keselamatan Malaysia', that the wife of the applicant did not know the reason for the arrest of her husband. Rather, the reasonable deduction has to be that the wife of the applicant knew why the applicant was arrested, given that she admitted (see encl 2 para 8) she was given 'FM–1' stating that the applicant was arrested under s 73 of the ISA, and also given that she argued (she could not if she knew not the grounds of arrest) that the applicant could not have been involved in any activity detrimental to the security of Malaysia.

There is also no merit in the argument that the right to counsel under art 5(3) of the Constitution was denied. In *Theresa Lim Chin Chin*, the then Supreme Court, per Salleh Abbas LP put forth the question 'when should a detainee arrested under s 73 of the ISA be allowed to exercise his right under art 5(3) of the Constitution to consult a lawyer of his choice?' and unequivocally answered:

> We should reiterate what was held by the Federal Court in *Ooi Ah Phua v Officer in Charge, Criminal Investigations, Kedah/Perlis*. In other words, the matter should best be left to the good judgment of the authority as and when such right might not interfere with police investigation. To show breach of art 5(3), an applicant has to show that the police had deliberately and with bad faith obstructed a detainee from exercising his right under the article.

That the police had deliberately and with bad faith obstructed the applicant from exercising his right under art 5(3) of the Constitution has not been shown. What appears rather is that the police had refused visitation by relatives and counsel pending ongoing but yet unfinished investigations. That was not any denial of the right to counsel (see also *Saul Hamid bin Fakir Mohamad v Inspector Abdul Fatah bin Abdul Rahman* [1999] 6 MLJ 800). The reply (encl 7 exh 'PS–I') 'sebarang lawatan sama ada dari keluarga mahupun daripada peguam firma tuan akan menjejaskan proses penyiasatan polis yang kini sedang dijalankan' did not show bad faith and should have been accepted.

To say the least, the argument with regard to DSP Surina's report to the IGP or designated officer was in sixes and sevens. First counsel submitted: 'Surina bte Saad ... in fact submitted the report to the designated officer'. Then contradicting himself, counsel submitted that 'since the IGP received the report, but the report to the Minister was made by the designated officer, then neither the IGP nor designated officer had applied his mind' and 'since the report was submitted to the IGP, there was no material before the designated officer for him to apply his mind'. And

seemingly oblivious to the fact that he had earlier contended that the report was submitted to the designated of freer, counsel submitted, 'In para 9 of encl 7, the designated officer said he received the report. But there is no evidence that the report was forwarded to him.' With respect, the maxim 'allegans contraria non est audiendus' meaning he is not to be heard who alleges things contradictory of each other, always applies, and counsel could not contend on the one hand that the report was submitted to the designated officer and then argue on the other that there is no evidence that the report was submitted to the designated officer. In any event, how could counsel contend that there is no evidence that the report was submitted to the designated officer. There is DSP Surina's sworn statement (encl 8 para 3) that she reported the circumstances of the arrest and detention of the applicant to DSP Philip who she said was the 'Pegawai Turus E6B1' and the officer designated under s 73(3)(c) of the ISA, and there is DSP Philip's sworn statement (encl 7 paras 1 & 7) that he was a 'Pegawai Turus E6B1' and the officer designated under s 73(3)(c) of the ISA and that he received the report from DSP Surina on 28 August 2001 at 11.30am. Given those sworn statements by DSP Surina and DSP Philip, how ever could it be contended that there is no evidence that DSP Philip was a designated officer and or a designated officer at the material time?

Counsel argued that the designated officer was not a mere postman, but should apply his mind as he prepared the report to the Minister. Yet counsel would still complain, because counsel contended that the designated officer deliberated on the matter of the extension of the detention, that the designated officer assumed powers not given in s 73(3)(c) of the ISA. Counsel contended that the allegations against the applicant could be tried in a court of law. Unfortunately, the present circumstance of the applicant seems not to have been understood. The applicant is not under any preventive detention. There is no s 8 order. Presently, the applicant is being detained 'pending enquiries', much the same as in the position of a person being detained pending investigations under s 117 of the Criminal Procedure Code (for an analogy, see *Timbalan Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors v Cheow Siong Chin* [1988] 1 MLJ 432, where the then Supreme Court held that 'the arrest of a person under s 2(i) of the Restricted Enactment is no different from the arrest of a person who is alleged to have committed a crime and that his detention pending an order under 2(ii) of the Enactment is no different from the remand in custody of an arrested person pending trial'). Except that detention under s 73 of the ISA may lead to a s 8 detention order, while detention under s 117 of the CPC may culminate in a trial. And except that there is no trial under the ISA, detention under the ISA is a preventive detention where a person is detained without trial. A criminal proceeding and preventive detention are not parallel proceedings. The object of a criminal prosecution is to punish a person for an offence committed by him, while a preventive detention is an anticipatory measure and may not relate to an offence (see p 187 of DD Basu's *Shorter Constitution of India* (12th Ed, 1999), (*Ketua Polis Negara v Abdul Ghani Haroon*, per Haidar FCJ). The fact of the matter is that there is power under the ISA to detain up to 60 days pending enquiries (see *Lock*

Wee Kock v Menteri Hal Ehwal Dalam Negeri & Anor [1993] 3 MLJ 691 at p 694). The applicant could not insist that the detaining authority must act only under ordinary criminal laws. The further fact of the matter is that the making of an order under s 8 of the ISA, even if it should come to that, will not be the result of a trial, and it was futile to argue before a court without jurisdiction to consider the material if any against the applicant, that the allegations must be supported by evidence.

The right to apply for a writ of habeas corpus is enshrined in art 5(2) of the Constitution. That right is not illusionary. But for the applicant to be released, unlawful detention must be shown. But that and mala fides have not been shown. In all the circumstances, and for the reasons herein, habeas corpus is refused.

Habeas corpus refused.

Reported by Chan Chin Chye